Supreme Court, U.S.
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No. 94-788

In The

# Supreme Court of the United States

October Term, 1994

CITY OF MILWAUKEE,

*Petitioner,*

v.

CEMENT DIVISION, NATIONAL GYPSUM COMPANY, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF OF RESPONDENTS, CEMENT DIVISION, NATIONAL GYPSUM COMPANY, ET AL., IN OPPOSITION

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## STATEMENT OF THE CASE

Respondents agree with Petitioner's Statement of the Case.

## SUMMARY OF ARGUMENT

Petitioner argues that this Court should accept certiorari, reverse the Seventh Circuit, and hold that the existence of a genuine dispute regarding liability, which courts have noted generally arises in a mutual fault setting, is a "peculiar circumstance" which justifies a denial of prejudgment interest. (Petition 8, *citing Inland Oil & Transport Co. v. Ark-White Towing Co.*, 696 F.2d 321 (5th Cir. 1983)). Petitioner correctly points out that the Seventh Circuit, citing this Court's decision in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), found that the rationale which dictated that prejudgment interest be discretionarily allowable in cases of mutual fault was obviated by the abrogation of the equal division of damages rule. (Petition 8a, 9a). Petitioner states that the Seventh Circuit's holding is erroneous because 1) *Reliable Transfer* "did not discuss, much less address, the question of whether mutual fault justifies denial of prejudgment interest because that question was not before the court;" and 2) the fact that Respondent was found to be more at fault than Petitioner justifies denial of prejudgment interest (Petition 9).

The reasons advanced by Petitioner do not warrant granting the Petition for several reasons. First, this Court has approved of an award of prejudgment interest in a mutual fault admiralty collision case in *The Manitoba*, 122

U.S. 97 (1887). Second, contrary to Petitioner's assertions, this Court's ruling in *Reliable Transfer* precludes a decision not to award prejudgment interest on the basis of mutual fault of the parties. Finally under *Reliable Transfer*, degree of fault is an irrelevant and unwarranted consideration in a court's exercise of discretion not to award prejudgment interest in a mutual fault setting, because it has already been taken into account in determining liability.

## I. THIS CASE DOES NOT WARRANT REVIEW BECAUSE THIS COURT HAS ALREADY APPROVED OF AN AWARD OF PREJUDGMENT INTEREST IN A MUTUAL FAULT, ADMIRALTY COLLISION CASE.

Over one hundred years ago this Court determined that an award of prejudgment interest in a collision involving mutual fault is proper. In *The Manitoba, supra*, this Court considered a case involving two vessels, i.e., the Propeller Comet and the Steamboat Manitoba, which collided in Lake Superior in 1875. As a result of the collision, the Comet sank and was a total loss. The Manitoba incurred damages in the amount of $5,000.

Nine days after the accident the owners of the Comet commenced an action in admiralty against The Manitoba and seized her. They sought damages in the sum of $70,125 including $30,000 for the loss of the Comet, $35,000 for her cargo and $5,125 for freight. The owners of The Manitoba appeared, answered, pleaded limitation of liability as a defense and posted a $28,694.95 bond for the release of The Manitoba. They also cross-libeled (cross-claimed) for damages to The Manitoba in the sum

of $5,000. The owners of the Comet answered the cross-libel and, in defense, pleaded discharge of liability based on the total loss of the Comet and her freight.

Trial of the case resulted in a finding of fault on the part of both vessels. The Comet was held to have the greater fault for actually initiating the collision course and then failing to stop and reverse her engines when it became apparent that a collision was going to occur. The Manitoba was held at fault for failing to stop and reverse her engines when it became apparent that a collision would occur. The divided damages rule was then in effect. This meant that the damages of each of the parties, plus prejudgment interest thereon from the date of the collision to the date of judgment, i.e., $85,818.16 for the Comet and $7,470 for The Manitoba, were to be added together and then divided equally so that each party would incur liability for damages in the sum of $46,644.08. Since the loss of the owners of the Comet, and her cargo and pending freight, was greater than that of the owners of The Manitoba by the sum of $78,348.16, one-half of that difference was $39,174.08. This Court held that the amount of the liability of the owners of The Manitoba to the owners of the Comet on the date of the judgment on a division of damages, after proper allowance to The Manitoba for her damage and without reference to limitation of liability, was $39,174.08. However, because the liability of the owners of The Manitoba was limited to the amount of the bond which had been posted to release the vessel with interest from the date of judgment, their liability was reduced to $32,090.45, even though The Manitoba was the vessel least at fault.

By its action, this Court specifically approved a result whereby mutual fault was not a reason to deny prejudgment interest, and in this case was not a reason to deny a recovery by the party with both greater fault *and* greater damages from the party less at fault which had incurred less damages. The court specifically stated as follows:

> This decree was proper in its figures. *Allowing interest on the damages from the date of the collision to the date of the decree, (which was proper,)* and fixing the liability for the $28,694.95 as of the date of the decree, (which was proper, in view of the fact that the condition of the bond was to 'abide and answer the decree,' and so the $28,694.95 did not carry interest prior to the date of the decree,) The Manitoba was liable to pay to the Comet $36,476.74, on a proper computation based on a division of the damages, according to the principle of computation hereinafter stated, and The Manitoba had the proper limitation of liability in paying only $28,694.95 at the date of the decree. The discrepancy between that amount and the amount stated in the bond is not explained, but is not remarked upon by the parties. The obligers in such a bond are not liable for interest prior to the decree of the district court, but are liable for interest from the date of such decree. *The Ann Caroline*, 2 Wall. 538 [1865]; *The Wanata*, 95 U.S. 600 [1877].

122 U.S. at 101-102 (emphasis added).

The decision of this Court in *The Manitoba* was 88 years prior to this Court's decision in *Reliable Transfer*, at a time when the equal division of damages rule was in full force and effect. *Reliable Transfer* abandoned the rule of divided damages (except when a court is unable to

apportion fault) and adopted the rule of true comparative negligence in maritime collision cases. Since this Court approved an award of prejudgment interest in a mutual fault situation against a party who was less at fault and sustained less damages at the time of the divided damages rule, *a fortiori* under the current rule of true comparative negligence, an award of prejudgment interest under similar facts should be mandatory, not discretionary, unless precluded by special circumstances such as undue delay in bringing or prosecuting suit (laches), exaggeration of claims, and other post-accident considerations.

At the beginning of the Conclusion section of its Petition, the Petitioner specifically states that "this Court has held that an award of prejudgment interest in admiralty 'rested in the discretion of the court below' ", *citing The Maggie J. Smith,* 123 U.S. 349, 356 (1887). Petitioner also states that in *The Maggie J. Smith,* "this Court held that denying prejudgment interest to a party found not to be at fault for a collision is a proper exercise of the district court's discretion." (Petition 14). What Petitioner does not note is the fact that *The Maggie J. Smith* concerned whether or not interest should be allowed upon a stipulation for value (bond) posted in a limitation of liability proceeding in admiralty. The question actually was whether or not the court should allow interest on the bond which evidently did not contain a provision therefor, such not being required at that time in the 1880s. As a matter of fact, the quotation from *The Manitoba,* set forth above, which was decided in advance of *The Maggie J. Smith,* specifically states that the obligers on a limitation of liability bond are not liable for interest prior to the decree (judgment) of the district court. Presumably, at the

time of the decisions in both *The Maggie J. Smith* and *The Manitoba*, there was no requirement for interest on the value bond. *See In re Harris*, 57 Fed. 243, 245 (2nd Cir. 1893). This was subsequently remedied by the statutory requirement for 6% interest on limitation of liability bonds in Rule 51 of the Admiralty Rules of Practice for the Courts of the United States, promulgated by the Supreme Court of the United States December 6, 1920, effective March 7, 1921, rescinded July 1, 1966, Benedict on Admiralty, Seventh Edition (Revised) (1994) pp. 91-94, and now in Rule F(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims to the Federal Rules of Civil Procedure, 28 U.S.C.A., Rule 71a to End, pp. 410-411 (1994), added Feb. 28, 1966, effective July 1, 1966. App. 1-5.

## II. DISTRICT COURTS DO NOT HAVE THE DISCRETION TO DENY PREJUDGMENT INTEREST IN ADMIRALTY COLLISION CASES FOR MUTUAL FAULT BECAUSE OF THIS COURT'S DECISION IN *RELIABLE TRANSFER*.

This Court has recognized that "[p]rejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virginia v. United States*, 479 U.S. 305, 310, n.2 (1987). In *West Virginia*, this Court held that the State of West Virginia was liable to the United States for prejudgment interest on a debt arising out of a contractual obligation to reimburse the Army Corps of Engineers for disaster relief services rendered by the Corps. Rejecting the State

of West Virginia's argument that it should not be liable for such interest, this Court declined to apply a "balancing of the equities" approach which Petitioner advocates here:

> The District Court held that whether interest had to be paid depended on a balancing of equities between the parties; the Court of Appeals rejected such an approach, *as do we*. This is not to say that an equitable consideration such as laches cannot bar an otherwise valid claim for interest . . .

*Id.* at 311, n. 3 (emphasis added). This Court's decision in *Reliable Transfer* is consistent with *West Virginia's* mandate that prejudgment interest serves to compensate for loss of use of money due as damages, as its name implies, from the time of the damage to the time when judgment is entered.

The clear mandate and result of *Reliable Transfer* is that parties who are less at fault in a mutual fault collision case are no longer to be penalized by being forced to absorb damages disproportionate to their fault. Thus, the "balancing of the equities" approach, rejected by this Court in *West Virginia*, is neither appropriate nor necessary. That *Reliable Transfer* did not specifically address mutual fault in connection with an award or denial of prejudgment interest is irrelevant to this Court's general and overriding view that prejudgment interest is compensation for use of money. As this Court noted in *Reliable Transfer*, when discussing the rationale justifying application of proportionate fault, as opposed to the 100 year old equal division of damages rule, which it specifically overruled:

> "It is no longer apparent, if it ever was, that this Solomonic division of damages serves to achieve even rough justice. An equal division of damages is a reasonably satisfactory result only where each vessel's fault is approximately equal and each vessel thus assumes a share of the collision damages in proportion to its share of the blame, or where proportionate degrees of fault cannot be measured or determined on a rational basis. The rule provided palpably unfair results in every other case. For example, where one ship's fault in causing a collision is relatively slight and her damages small, and where the second ship is grossly negligent and suffers extensive damage, the first ship must still make a substantial payment to the second." (Footnote omitted.)

*Reliable Transfer*, 421 U.S. at 405.

Courts have recognized that the comparative fault rule, which this Court established in *Reliable Transfer*, is in large part, designed to achieve a fair assessment of damages against each party according to each party's degree of fault. *See, e.g., Joia v. Jo-Ja Service Corp.*, 817 F.2d 908, 917 (1st Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988). The "unfair results" this Court had in mind, when it replaced the divided damages rule with the proportionate fault rule, clearly arose where one party's liability for the damages of another in a mutual fault collision case was disproportionate to the degree of fault of that party in causing the collision. Under this scenario, a penalty of sorts was levied against the less-at-fault party because that party was obliged to absorb one-half the damages (and interest) associated with the liability of the more-at-fault party. This resulted in the more-at-fault party

absorbing less than its fair share. *Cf. Alkmeon Naviera, S.A. v. M/V "Marina L."*, 633 F.2d 789, 798, n. 12 (9th Cir. 1980). Conversely, when a party's liability is assessed on the basis of that party's proportionate fault, the damages (and interest on *those* damages) square with the party's actual assessed responsibility in causing those damages. To deny prejudgment interest would be, therefore, redundant and, in addition, an unwarranted penalty.

The Sixth, Seventh and Ninth Circuits, as well as district courts in the First, Second, Third and Eighth Circuits, have explicitly or implicitly held that mutual fault *does not* constitute a special circumstance justifying the denial of prejudgment interest. *Cement Div. Nat. Gypsum Co. v. City of Milwaukee*, 31 F.3d 581 (7th Cir. 1994); *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1990); *Alkmeon Naviera, supra*; *STARLIGHT I, Inc. v. Patriots Corp.*, No. 83-3783-Z, slip op. (App. 6) (D.C.Mass. 1985); *Trans Pacific Shipping Co. v. Smith-Rice Co.*, 1992 U.S.Dist. LEXIS 16,017 (N.D.Cal. 1992) (App. 19); *Granholm v. TFL Express*, 576 F.Supp. 435 (S.D.N.Y.1983); *Complaint of B.F.T. No. Two Corp.*, 433 F.Supp. 854 (E.D.Pa. 1977); *Lone Star Industries v. Mays Towing Co.*, 725 F. Supp. 440 (E.D. Mo. 1989) *rev'd on other grounds*, 927 F.2d 1453 (8th Cir. 1991). These cases are entirely consistent with *Reliable Transfer*. Nothing in *Reliable Transfer* dictates that an award of prejudgment interest should be treated any differently under the proportionate fault regime. To hold, as the Fifth and Eleventh Circuits do, that mutual fault justifies a denial of prejudgment interest, would amount to a double penalty levied on the more-at-fault party because that party's liability has already been accounted for in full at the liability allocation stage. As succinctly stated by one court:

> "Under the proportionate fault rule, the degree of each parties' (*sic*) fault is taken into account in the initial determination of recovery. This formula obviously extinguishes the harsh effects of the divided damages rule. Further, to take proportionate fault into consideration in deciding on an award of prejudgment interest would penalize a party twice for the same mistake. Therefore, our determination that [the party seeking prejudgment interest] was more negligent [than the party from whom interest was sought] will not be afforded any weight in our decision to award interest." (Footnote omitted.)

*Complaint of B.F.T. No. Two Corp.*, 433 F.Supp. at 876. Petitioner's reliance is solely upon decisions in the Fifth and Eleventh Circuits, *Inland Oil, supra*, and *Parker Towing Co. v. Yazoo River Towing, Inc.*, 794 F.2d 591 (11th Cir. 1986), which are not only the minority rule, but are also erroneous.[1]

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[1] Two points are noteworthy with respect to this line of cases. First, the Eleventh Circuit generally follows the Fifth Circuit, as it was once a part of the Fifth Circuit. Second, the Fifth Circuit rationale for denying prejudgment interest in cases of mutual fault is unclear and confusing. In *Inland Oil, supra*, the Fifth Circuit states that its cases "have *consistently* upheld denials of prejudgment interest in cases of apportioned fault." *Inland Oil*, 696 F.2d at 328 (emphasis added). However, at no point in *Inland Oil* (or *Noritake v. M/V Hellenic Champion*, 627 F.2d 724 (5th Cir. 1980), for that matter) does the Fifth Circuit explain its rationale for departure from its earlier holdings in which mutual fault was not found to preclude an award of prejudgment interest. *See, Sinclair Refining, Co. v. S/S Green Island*, 426 F.2d 260 (5th Cir. 1970); *National Marine Service, Inc. v. Talley*, 348 F.2d 589 (5th Cir. 1965).

## III. DEGREE OF FAULT SHOULD BE IRRELEVANT TO THE AWARD OF PREJUDGMENT INTEREST IN A MUTUAL FAULT SETTING.

Petitioner appears to argue, alternatively, that the greater fault of a party justifies a decision to deny prejudgment interest to that party in an admiralty collision case because "distortions in compensation" can occur. (Petition 14-15) As noted in the passage from *Complaint of B.F.T., supra,* under *Reliable Transfer,* such a position is untenable. *Reliable Transfer* stands for the proposition that distortions in compensation will no longer occur because the parties' liability is no longer subject to an arbitrary division of damages without regard to degree of negligence, but rather damages are to be allocated to parties in actual proportion to their relative degree of fault. Petitioner incorrectly argues that "distortions in compensation" can occur under both the equal division of damages rule and the proportionate fault rule, and that "the rule in *Alkmeon Naviera* can result, as in this case, in greater distortion in compensation in favor of the party who has the greater degree of fault than the equal division of damages rule." (Petition 15)

Implicit in the foregoing is the premise that a distortion in compensation occurs when the more-at-fault party sustains greater damages. Petitioner appears to argue that a penalty should attach in such a situation, and asks this Court to consider and ultimately adopt a *per se* rule that prejudgment interest is to be denied when the more-at-fault party sustains greater damages in order to avoid a "distortion in compensation." Such a rule would be inconsistent with *Reliable Transfer* because, under a proportionate fault regime, the measure of damages which a

party *sustains* has no bearing on its liability in the first instance and certainly no bearing on its compensation. The proportionate basis for compensation is determined when the negligence of the parties is compared and liabilities are assessed. In a mutual fault setting, prejudgment interest is assessed on *each party's* liability so that there is no distortion in ultimate compensation. Whether the offset is at the beginning on the assessed liabilities, with interest on the balance, or at the time of payment using totals of liability plus interest, the result is the same. To deny assessment of prejudgment interest would be to evoke a second penalty upon the party entitled to offset recovery based solely upon amount of damages, that party already having been penalized for its negligence in the assessment of liability.

In *STARLIGHT I, Inc.*, (App. 6) the United States District Court for the District of Massachusetts apportioned liability thirty percent to the plaintiff and seventy percent to the defendant. Even with the thirty/seventy apportionment, the District Court explicitly recognized that the plaintiff "had the use of thirty percent of the amount of the damages to [the defendant]," and offset the amount of interest owing on the defendants damages against the interest owing on the plaintiffs damages. App. 17. Thus, in a case with an even greater apportionment of fault than the immediate case, the "more at fault" defendant was correctly awarded prejudgment interest. An identical result (30/70 proportionate fault with the more at fault party recovering prejudgment interest on its greater damages from the less at fault party) was reached in *Matter of Getty Marine Corp. v. Jade Shipping Co.*, 1983 A.M.C. 550 (E.D. Va. 1982). These decisions are consistent

with the proportionate fault rule in *Reliable Transfer*, as well as the "time value of money" concept in *West Virginia*.

While prejudgment interest is an element of compensation, it is secondary to the measure of damages and, obviously, dependent upon it. Arguing that "distortions in compensation" occur with respect to an award of prejudgment interest in a situation where the party seeking interest is more at fault and has sustained greater damages is incongruous. It amounts to "mixing apples and oranges" under the rule articulated in *Reliable Transfer*. As such, Petitioner's reliance on *Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191 (5th Cir. 1982), and other Fifth Circuit decisions, is misplaced.

## CONCLUSION

The Petition should be denied consistent with the rationale and actual holdings of this Court. In *The Manitoba* this Court approved of an award of prejudgment interest in a mutual fault admiralty collision case, implicitly recognizing that prejudgment interest is an element of compensation to which a party is entitled notwithstanding the degree of fault. Subsequent to that decision, in *West Virginia* this Court explicitly recognized that prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until the time that judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress.

The result of this Court's decision in *Reliable Transfer*, while decided before *West Virginia*, is consistent with that case and with this Court's decision in *The Manitoba* in that parties who are less at fault in a mutual fault collision case are no longer to be penalized by being forced to absorb liability disproportionate to their fault. For the same reason, magnitude of fault is a consideration mal-apropos. In sum, a denial of prejudgment interest for mutual fault in an admiralty collision case would be redundant, would serve as a double penalty, and would subvert the reasons underlying this Court's holdings in *West Virginia* and *Reliable Transfer*. Anything other than a denial of this Petition would be inconsistent with those decisions.

Respectfully submitted,

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## ADMIRALTY RULES OF PRACTICE FOR THE COURTS OF THE UNITED STATES

### RULE 51 – Limitation of Liability – How Claimed

The owner or owners of any vessel who shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the Act of March 3, 1851, entitled "An Act to limit the liability of shipowners and for other purposes" (Sections 183 to 189 of Title 46 of the U.S. Code) as now or hereafter amended or supplemented, may file a petition in the proper District Court of the United States, as hereinafter specified. Such petition shall set forth the facts and circumstances on which limitation of liability is claimed, and pray proper relief in that behalf. It shall also state facts showing that the petition is filed in the proper district; the voyage on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort, arising on that voyage, so far as known to the petitioner, and what suits, if any, are pending thereon; whether the vessel was damaged, lost or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If any of the above particulars are not fully known to the petitioner, a statement of such particulars according to the best knowledge, information, and belief of the petitioner shall be sufficient. With his petition the petitioner may, if he so elects, file an interim stipulation, with sufficient sureties or an approved corporate surety, for the payment

into court whenever the court shall so order, of the aggregate amount of the value of petitioner's interest in the vessel at the close of the voyage or, in case of wreck, the value of the wreckage, strippings or proceeds, and of any pending freight recovered or recoverable, with interest at six percent per annum from the date of the stipulation, and costs. If such interim stipulation is filed, it shall be accompanied by an affidavit or affidavits of a competent person or persons corroborating the statement in the petition as to value of the vessel, or her wreckage, etc., and her freight. Said court, having caused due appraisement to be had of the value of petitioner's interest in the vessel, or her wreckage, etc., and her freight shall make an order for the payment of the same into court, or for the giving of a stipulation, with sufficient sureties or an approved corporate surety, for the payment thereof into court with interest at six percent per annum from the date of the stipulation, whether interim or final, and costs, whenever the same shall be ordered; or, if the petitioner shall so elect, the court without such appraisement shall make an order for the transfer by the petitioner of his interest in such vessel, or her wreckage, etc., and freight to a trustee to be appointed by the court under the fourth section of said Act.

If a surrender of petitioner's interest in the vessel or her wreckage, etc., is offered to be made to a trustee, the petition must further show any prior paramount liens thereon, and what voyage or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and

causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

Upon the filing of such interim stipulation, or upon determination of value by appraisal and compliance with the court's order with respect thereto, or upon compliance with a surrender order, as the case may be, the court shall issue a monition against all persons asserting claims in respect to which the petition seeks limitation, citing them to file their respective claims with the Clerk of said court and to serve on or mail to the proctors for the petitioner a copy thereof on or before a date to be named in said writ which shall be not less than 30 days after issuance of the same, which time the court, for cause shown, may enlarge.

Notice of the monition shall be published in such newspaper or newspapers as the court by rule or order may direct in substantially the following form, once in each week for four successive weeks before the return day of the monition:

United States District Court
District of

Notice of Petition for Exoneration from or Limitation of Liability

(Filed ___)

Notice is given that ___ has filed a petition pursuant to Title 46, U.S. Code, §§ 183-189, claiming the right to exoneration from or limitation of liability for all claims

arising on the voyage of the vessel ___ from ___ to ___ terminating on ___.

All persons having such claims must file them, under oath, as provided in United States Supreme Court Admiralty Rule 52, with the Clerk of this Court, at the U.S. Court House at ___ and serve on or mail to the petitioner's proctors ___ at ___ a copy on or before ___ or be defaulted. Personal attendance is not required.

Any claimant desiring to contest the claims of petitioner must file an answer to said petition, as required by Supreme Court Admiralty Rule 53, and serve on or mail to petitioner's proctors a copy.

_____

U. S. Marshal.

The petitioner not later than the day of second publication shall also mail a copy of the above notice (copy of the monition need not be mailed) to every person known to have made any claim against the vessel or the petitioner arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice, together with a copy of Rule 52, shall be mailed to the decedent at his last-known address, and also to any person who shall be known to have made any claim on account of such death.

The said court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect to any claim or claims subject to limitation in the proceeding.

Originally adopted in 1872 as Rule 54; renumbered in 1920, amended in 1891 and on June 21, 1948. Discussion, § 516.

Rule 51, requiring petition to plead facts and circumstances, contains no requirement for the pleading of legal conclusions: Blackler v F. Jacobus Transportation Co., 1960 AMC 581, 243 F2d 733 (CA 2, 1957).

Rule 51 gives the court power to enlarge the time for filing by allowing late claims: Petition of Tugboat Dalzellea, 1966 AMC 28 (SD NY, 1965).

STARLIGHT I, INC. vs. PATRIOTS CORPORATION
and the F/V PATRIOTS

STARLIGHT I, INC. v. PATRIOTS CORP.

CIVIL ACTION NO. 83-3783-Z

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Slip Opinion

August 9, 1985

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OPINION BY: ZOBEL

OPINION: MEMORANDUM OF DECISION

ZOBEL, D.J.

On September 15, 1982, the fishing vessels STARLIGHT I ("Starlight") and PATRIOTS ("Patriots") collided at sea in the Great Round Shoal Channel. Both vessels were damaged, and both parties, the corporate owners of the vessels, charge that the other vessel was primarily at fault in causing the collision. The case was tried before me without a jury on May 14 and 15, 1985. I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

Great Round Shoal Channel (the "Channel") is the primary passage between Monomoy Island and Cape Cod

to the north and Nantucket Island to the south. It is the eastern entrance to Nantucket Sound and one of the routes used by fishing vessels steaming between New Bedford and the fishing grounds off Georges Bank. The eastern entrance to the Channel is marked by the "GRS" buoy. Proceeding east to west, the first nine nautical miles of the Channel, from "GRS" buoy to "GRC" buoy, follow a straight course. Both sides of the Channel are marked by numbered buoys along this portion: one, three, and five to the south, and two, four, and six to the north. At buoy one, the perpendicular width of the Channel is approximately two-thirds of a nautical mile.[1]

In the late afternoon of September 15, 1985, the Starlight, a western-rigged dragger owned by plaintiff, departed from New Bedford to drag for fish on Georges Bank. Her captain, Firmino Vaz Perreira, was at the helm and guided her through Nantucket Sound and into Great Round Shoal Channel. Approximately at the "GRC" buoy, fog began to set in, becoming heavy by the time she reached buoy three. Starlight was equipped with loran and radar, both of which were turned on. Perreira was using radar to navigate from one buoy to the next, passing to the north of the odd-numbered buoys and to the

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[1] I made this measure on the chart by plotting straight lines through buoys one and three and through buoys two and four. The width of the Channel is the distance from buoy one along a line perpendicular to the one-three line to the point of intersection with the two-four line. The perpendicular width of the Channel along this stretch is almost constant. Its narrowest measure, at buoy four, is .58 nautical miles. The perpendicular width contrasts with the diagonal measure directly from buoys one to two, a distance of just over one nautical mile.

south of at least two other vessels heading through the Channel in the opposite direction. At about buoy three, Perreira, feeling ill, left the pilothouse to go to the head. He left the helm with the mate, Joao Ferreira. Before leaving, Perreira identified a radar target, which he believed was another vessel, heading west about two or three miles from the "GRS" buoy. He directed Ferreira's attention to this other vessel and instructed Ferreira to proceed straight to buoy one. Because of the fog, he also slowed Starlight's speed from the 7 1/2 to 8 knots he had been steaming.

Ferreira testified that he took the helm at about buoy three, steaming at a reduced speed of 5 to 6 knots. Captain Perreira had drawn his attention to the approaching radar target. As he proceeded, converging with the target, Ferreira changed the range setting on the radar from eight to four to two to one-quarter miles, all the time monitoring the target's location. When he was within a quarter mile of the target, he also was within a quarter mile of buoy one. Ferreira believed that he had to pass inside the channel, that is, to the north of buoy one. He also saw on the radar screen that the other vessel, the target, was not allowing him sufficient way to pass between it and the buoy. He therefore decided to stop dead in the water and to let the other vessel pass. He continued to monitor the other vessel's position, but he did not realize that the tide and wind were turning the Starlight from its easterly heading to a northeasterly heading, which left her broadside in the Channel.

Ferreira first sighted the other vessel visually approximately one minute before the collision. The vessel was bearing down on the Starlight from her starboard side on

a course that would collide with Starlight's bow. Ferreira attempted to avoid the collision by sounding several whistle blasts and giving his engines full power forward,[2] but the other vessel hit the Starlight on her starboard side, about fifteen feet forward of her stern. After the collision, Perreira noted the loran readings for the Starlight's position as 1384 and 4384. These readings mark a position approximately one quarter mile west of buoy one and less than two-tenths of a mile perpendicularly from the southern boundary of the channel.[3]

At the time of the collision, the Patriots, a western-rigged scalloper, was steaming back to port after scalloping for about eight days. Her captain was off duty and asleep, and her mate, Philip G. Plante, was at the helm. From her last fishing position, Plante steamed on a northwest heading to the "GRS" buoy and passed to the south of it in thick fog. He had Patriots's radar and loran equipment on as he changed course to proceed through the Channel. On the radar, he identified buoys one and two, another vessel in the Channel about one and half miles ahead going in the same direction as the Patriots, and various targets outside the Channel, which did not concern him. He was steaming at approximately eleven

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[2] Although Captain Perreira was not in the pilothouse when the vessels collided, his testimony corroborates the sequence of actions taken by Ferreira. The captain heard the Starlight's engines slow, then the whistle blasts, and then the acceleration of the engines just before the collision.

[3] Philip Plante, mate of the Patriots, testified that he recalled a loran reading of 4341.5. I have found no markings on the chart that would place this anywhere near Great Round Shoal Channel.

knots. Plante testified that he passed within an estimated one hundred fifty feet of buoy one, close enough to see the glow of its light through the heavy fog. He was not particularly concerned with staying to one side of the Channel: "If there's nobody in the Channel, it's like driving down the road. If there's nobody in the road, the road's yours."

Plante never saw any indication of the Starlight on the Patriots's radar. He estimated that he first sighted the glow of Starlight's masthead light about one hundred fifty feet in front of him, while the Patriots was still proceeding at about eleven knots. As soon as he saw Starlight's green starboard running light, he determined her heading and threw the Patriots out of gear and then into reverse. He does not recall whether or not he turned the Patriots either to port or to starboard. Plante testified that the Starlight was crossing his bow from port to starboard, and that he heard her sound one whistle blast. By the time he collided with her aft quarter, he claims that Patriots was almost dead in the water. He described the collision as a "nudge" no greater than would be experienced in docking.[4]

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[4] I do not credit Plante's description of the collision as a soft nudge. At least one crewman on the Patriots's deck was knocked off his feet by the force of the impact. The parties have stipulated to the considerable damage suffered by both vessels. Furthermore, by my calculation, a boat traveling at eleven knots would cover one hundred fifty feet in less than ten seconds. Although I do believe that Plante reversed his engines and slowed the Patriots, I do not believe he could arrest her forward momentum in that short a space.

The force of the collision turned the boats side by side, their starboard beams touching and their bows pointing in opposite directions. There was no radio contact between them before or after the collision,[5] but crew members on both vessels were able to identify the name of the other during this close, slow passage. Defendant alleges, based on the testimony of two members of the Patriots's crew that the Starlight's fishing gear was in the water just after the collision, that the Starlight was fishing in the Channel when the collision occurred. Both Perreira and Ferreira deny that they were fishing. Because defendant's allegation is an element of its counterclaim that the Starlight was at fault, it bears the burden of proving that the Starlight was fishing. Although Perreira and Ferreira must be regarded as interested parties, their testimony that they were steaming through the Channel is consistent with their late afternoon departure from New Bedford. Defendant's witnesses also are interested parties, and it has offered nothing more, such as radar detection of the Starlight moving slowly outside the Channel, to further its hypothesis. On this state of the evidence, I find that defendant has failed to sustain its burden on this issue.[6]

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[5] Both parties have alleged that the other departed the scene of the collision first. I need not resolve this dispute. Although the failure to stand by and render necessary aid would constitute a violation of the International Rules of the Road, such a violation would have no causal relationship to the collision itself. Fortunately, both vessels returned safely to New Bedford under their own power.

[6] With respect to this issue, defendant is fishing for red herring. It suggests that fishing in the Channel would be negligent both per se and because it prevented Ferreira, upon seeing the Patriots, from reversing his engines.

Defendant's own expert, Lawrence O'Pezio, negated both theories of negligence. First, he testified that the appropriate navigational rule states only that a vessel fishing in a channel shall not impede the progress of a vessel steaming through the channel. Because the collision occurred in the "eastbound lane" of the Channel, the Starlight could not be considered to be impeding the westbound Patriots. Second, O'Pezio opined that Ferreira's movement forward was a reasonable and acceptable evasive maneuver in a close quarters situation.

I find that, just prior to the collision, both vessels were displaying adequate navigational lights. Neither vessel, however, was sounding a regular fog signal, nor had a watch posted in its bow. I also find, without any doubt, that the collision occurred on the south side of the Channel. Plante, defendant's mate, admitted this by his testimony that he passed within one hundred fifty feet of buoy one, and the position is confirmed by the loran readings taken by Perreira after the collision.

The parties have stipulated to the damages caused to each vessel by the collision. The repairs to the Starlight cost $44,789.30, and there were surveying costs of $1,428.23, for a total of $46,217.53. Patriots suffered a total of $9,108.53: $7,232.43 for repairs and $1,876.10 for surveying. The parties also stipulated that plaintiff, if it recovers any damages, is entitled to its lost profits for the period the Starlight was being repaired. The Starlight was unable to said [sic] from September 15 to October 23, 1982, a period of thirty-eight days. Calculating each trip to be eight or nine days of fishing and four days shore layover, the Starlight lost three trips. On its last three trips before the collision and first three trips after the

collision, the Starlight's average net boat share was $3,379.01 per trip. I therefore find that she lost profits in an amount of $10,137.03.

DISCUSSION

Having tried the case, both parties concede, as they must, that they were negligent in certain respects. The case therefore is one of mutual fault, and my task is to apportion the losses caused by the collision according to the respective degrees of negligence of the two vessels. United States v. Reliable Transfer Co., 421 U.S. 397 (1975). I assess the prudence of the vessels' various actions according to the International Rules of the Road for the Avoidance of Collisions at Sea and principles of good seamanship, as testified to by Lawrence O'Pezio, a qualified expert in marine navigation. I consider these actions in three categories: the vessels' general procedures under way in the conditions of that night; their courses and positions in the Channel; and their actions at close quarters after sighting one another.

Both vessels violated the Collision Rules by failing, while proceeding in fog, to sound regular fog signals or to maintain a lookout. These failures contributed to cause the collision because they diminished the time in which one or both of the vessels might have acted to avoid the collision. Minutes before the collision, both vessels also were violating the rules by steaming at unsafe speeds, given the weather conditions. The Starlight's speed violation, however, was removed as a cause of the collision when she stopped before approaching too closely to the Patriots. Although the Patriots slowed before actually

hitting the Starlight, her speed was a contributory cause because she was still steaming unreasonably fast when her mate spotted the Starlight. At that point, his ability to react was hampered by the speed at which he was steaming.

The course pursued by the Starlight was negligent in two respects, both related to Ferreira's reactions to the approaching radar target. First, in a technical sense, Ferreira failed to assess the risk of a collision with the Patriots. This violation lay in his failure to plot the Patriots's course and to adopt an alternative course, possibly one outside the Channel. This, however, was only a partial or technical omission, because Ferreira did not continue to steam without regard for the other vessel. He did take some evasive action – he stopped – based on the risk of a collision. The Starlight's second fault in maneuvering, and its primary act of negligence, was to stop dead in the water. By doing so, she became less maneuverable and drifted into a more vulnerable position in the Channel. Again, however this aspect of the Starlight's negligence is mitigated in that, by slowing to a stop, Ferreira removed the opposite violation of proceeding at excessive speed under the circumstances.

In contrast to the Starlight's negligent maneuvering in reaction to its radar sighting of the Patriots, the Patriots's omissions proceed from Plant's [sic] failure ever to observe the Starlight on the Patriots's radar. Although O'Pezio testified that the failure to detect a radar target is not a violation of the Collision Rules, it is an act of negligence when the vessel continues to steam without caution for the fog, presumably in misplaced relianceupon its inaccurate radar observations. Plante's belief

that the road was his led him to navigate at excessive speed on the port side of the channel, a clear violation of the rules. This fact was the primary cause of the collision. Despite the Starlight's imprudent maneuver and even the Patriots's excessive speed, the collision would not have occurred had the Patriots passed properly farther to the north.

Finally, I find no fault in the emergency actions taken by either mate at close quarters. O'Pezio testified that any action reasonably calculated to avoid a collision is proper when the vessels are in extremis. Both Ferreira's full power forward and Plante's attempt to stop constitute such reasonable actions.

I conclude that liability for the collision should be borne seventy percent by defendant and thirty percent by plaintiff. Plaintiff therefore is entitled to $39,448.19, seventy percent of the total of the amount for repairs to the Starlight, survey of the Starlight, and detention damages. Defendant is entitled to a set-off against this amount of $2,732.56, thirty percent of the damages to the Patriots. Plaintiff's recovery, without prejudgment interest, is $36,715.63.[7]

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[7] This figure also results from adding the total damages caused by the collision, including plaintiff's detention damages ($65,463.09); calculating seventy percent of that figure to determine the share for which defendant is liable ($45,824.16); and subtracting the amount already paid by defendant ($9,108.53). This methodology parallels that formerly used under the rule of divided damages. See United States v. Reliable Transfer Co., 421 U.S. 397, 400 n.1 (1975).

The only remaining issue is whether plaintiff is entitled to recover prejudgment interest. The general rule in admiralty cases is that prejudgment interest is to be awarded absent special or extraordinary circumstances. See Central Rivers Towing, Inc. v. City of Beardstown, 750 F.2d 565, 574 (7th Cir. 1984). Defendant argues that such circumstances exist here because plaintiff did not commence its suit until fourteen months after the collision, because plaintiff has not established an adequate evidentiary foundation for interest, and because the collision resulted from the parties' mutual fault. I disagree and exercise my discretion to award interest as calculated below.

I do not find plaintiff's delay of fourteen months to be unreasonable or inexcusable. By affidavit, plaintiff has offered the post-trial explanation that it was waiting for the results of the Coast Guard inquiry into the collision before filing its complaint. I will not strike this affidavit. At the conclusion of the trial, the parties reserved the prejudgment interest issue and other evidentiary matters for further briefing and submissions, and defendant has suffered to [sic] prejudice by the post-trial submission of plaintiff's affidavit. Similarly, I will accept plaintiff's attorney's sworn statement that the bill for repairs to the Starlight was paid on December 4, 1982. At trial, extensive proof of the repairs to both vessels was obviated by stipulation. I will not now foreclose a part of plaintiff's recovery on the ground that the stipulation omitted a minor, indisputable fact.

Some courts have indicated that mutual fault should be considered as a factor opposing the award of prejudgment interest because it increases uncertainty as to liability. See, e.g., Ceja v. Mike Hooks, Inc., 690 F.2d 1191, 1196-97 (5th Cir. 1982); First National Bank of Chicago v. Material Service Corp., 597 F.2d 1110, 1121 (7th Cir. 1979). But even these cases do not establish a per se rule against prejudgment interest in mutual fault cases, and other courts have questioned the rationale for considering mutual fault in determining prejudgment interest. See Alkmeon Naviera, S.A. v. M/V Marina L, 633 F.2d 789, 797-98 & n.12 (9th Cir. 1980); Algonquin Deep Sea Research Corp. v. Perini Corp., 353 F. Supp. 561, 565 (D. Mass. 1973). I am persuaded that the purpose of compensating an injured party fully will be served only by awarding plaintiff prejudgment interest on that portion of the damages attributable to defendant's fault.

The interest rate to be used is discretionary. I look for guidance to the statutory rate awarded in Massachusetts tort cases, Mass. Gen. Laws Ann. ch 231, @ 6B (West 1985), which agrees approximately with the cost of borrowing money at favorable rates, and set the rate for this case at twelve percent. See Central Rivers Towing, 750 F.2d at 574. This interest rate must be applied to each item of damages separately. Interest on plaintiff's detention damages will commence on October 23, 1982, the date the Starlight sailed again and her lost profits were fully accrued. Interest on the amount for physical damage to the Starlight will run from December 4, 1982, the date plaintiff paid for the repairs. Plaintiff, however, had use of thirty percent of the amount of the damages to the Patriots. In the interest of fairness, I will presume that

defendant paid for those repairs on the same date. Accordingly, the amount of the principal accruing interest from December 4, 1982 will be reduced by $2,732.56.[8]

CONCLUSION

I find that the collision was caused seventy percent by defendant's fault and thirty percent by plaintiff's fault. Judgment will enter for plaintiff in the amount of $36,715.63, plus prejudgment interest of $12,803.75 as of August 9, 1985.

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[8] The Clerk of Court has calculated the amount of prejudgment interest, at the annual rate of twelve percent, as follows: From October 23 to December 4, 1982, $7,095.92 (seventy percent of $10,137.03) earned interest of $993.43. From December 4, 1982 to August 9, 1985, the total amount of $36,715.63 earned interest of $11,810.32. Thus, as of August 9, 1985, the total amount of prejudgment interest is $12,803.75.

TRANS PACIFIC SHIPPING CO., Plaintiff, -vs.- SMITH-RICE CO. and AMERICAN NAVIGATION CO., Defendants. SMITH-RICE CO., Third-Party Plaintiff, -vs.- SCHNITZER STEEL PRODUCTS CO., INC., Third-Party Defendant.

No. C 89-3673 MHP

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

1992 U.S. Dist. LEXIS 16017

October 14, 1992, Decided
October 14, 1992, Filed and Entered

JUDGES: PATEL

OPINION BY: MARILYN HALL PATEL

OPINION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

This suit arises from damage sustained by the M/V PACGLORY ("PACGLORY"), owned by Trans Pacific Shipping Co. ("Trans Pacific"), when the propeller of the PACGLORY was fouled by an anchor wire extending from a derrick barge operated by Smith-Rice Co. ("Smith-Rice"). Third-party defendant Schnitzer Steel Products Co., Inc. ("SSP") is the operator of a waterfront scrap metal facility adjacent to the Oakland Estuary. SSP leases the facility from the Port of Oakland. The PACGLORY was attempting to depart from a berth operated by SSP when the accident occurred.

FINDINGS OF FACT

1. The PACGLORY is a bulk cargo ship which was and is owned and operated by Trans Pacific. At all times

relevant to this litigation the PACGLORY was managed by Trans Pacific's agent, Lasco Shipping Co. Joint Stmt. of Agreed Facts at 1.

2. The SSP facility has numbered berths and piers for ships to call and load scrap steel. Id.

3. Smith-Rice, among other activities, operates derrick barges. Smith-Rice is the owner of Crane Barge Number 5 (BARGE 5), the barge moored at SSP berth 2 at the time of the accident. Id.

4. SSP leases Pier Number 2 from the Port of Oakland. The Port of Oakland demolished approximately one half of the overall length of Pier Number 2 prior to 1987. As a result, SSP could no longer load scrap steel onto ships from that pier. Tr: Vol. 1-21:4-6; Tr. Bosserman.

5. In early 1987, SSP considered various new loading methods before deciding to use a crane barge to load ships calling at berth 2, the berth served by pier 2. The procedure finally adopted contemplated positioning a crane barge adjacent to the quay wall of berth 2. The ship was to be loaded would lie outboard but adjacent to the crane barge. Joint Stmt. at 1.

6. In the summer of 1987, after receiving bids on the new loading procedure from several companies, SSP hired Smith-Rice to load ships at SSP's berth 2. Id.; Tr. Bosserman.

7. Following the selection of Smith-Rice, SSP hired David Seymour, a naval architect to draw a plan for a mooring arrangement for ships loading at berth 2. This plan does not show the placement of the barge anchor

wires. Pl. Ex. 2; Joint Stmt. at 2. Albert Petty, the operations manager for Smith-Rice in 1987 was familiar with this plan. Tr. Vol. 1-21:22.

8. The intended procedure was as follows:

Before a ship arrived at berth two, a Smith-Rice tug would tow BARGE 5 to berth 2 where the barge would be positioned with its starboard side adjacent to the quay, the bow facing into the estuary. The crane boom rest was located on the bow of the barge and the crane machinery turret was located on the stern. Several soft (synthetic) lines and one steel wire running from the starboard stern fairlead to a bollard ashore secured the barge to the quay. Three additional steel wires ran to unbuoyed anchors from fairleads of the port stern and the port and starboard sides of the bow. Each of the anchors was a 16,000 pound navy "stockless" anchor. Joint Stmt. at 2. The wires were one and three-eighths inches in diameter and weighed three and one-half pounds per foot. Tr. Vol. 1-131:13.

9. Albert Petty of Smith-Rice designed the anchoring arrangement for the barge. Petty discussed the anchoring arrangement with Barry Bosserman, the ship loading superintendent for SSP, Harold Pollack, Director of Purchasing for SSP, and Gary Schnitzer, executive vice-president and general manager of SSP. Tr. Vol. 1-53:1-3, 119:20-25. SSP approved the anchoring arrangement proposed by Smith-Rice.

10. Smith-Rice stopped using the mooring arrangement requiring bow anchor wires after the anchor wire fouled the PACGLORY's propeller. Smith-Rice continued to use a crane barge to load ships calling at berth 2.

11. Smith-Rice did not discuss the mooring arrangement with Trans Pacific or warn anyone on the PACGLORY or any pilot about the presence of the anchor wires although it was aware vessels entering berth 2 would have to pass over the anchor wire and was aware that when moving and positioning the barge the anchor wire would be unlikely to pass under the PACGLORY near the propeller. Id. at 53:10-16, 155:13-16, 161:19-21, 163:10-13.

12. Smith-Rice maintains it informed SSP that the starboard bow anchor wire would be placed as straight as possible along the dock and that the port bow anchor wires would be placed at an angle favoring the port bow. This angle was necessary to ensure that BARGE 5 would not be damaged by contact with the irregular surface of the side of the quay. Tr. Vol. 1-51:7-8; 55:18-20; Pl. Ex. 5. The anchor wires were also used to move the barge along the side of the vessel. Tr. Vol.1-139-40.

13. SSP asserts that it understood the bow anchor wires would be placed parallel to the sides of the barge, sixty to seventy feet from the plane of the side of the barge and the ship, approximately sixty feet west of the placement indicated by Smith-Rice. Tr. Bosserman; Pl. Ex. 5; Bosserman Dep. at 34-35.

14. SSP did not ask for written confirmation of the location of the anchor wires or independently confirm the location of the anchor wires prior to the arrival of the PACGLORY at berth 2. Tr. Bosserman.

15. Bosserman states that during the day he remained on BARGE 5 approximately ninety-five percent of the time watching the loading operation. He should

have observed the direction of the anchor wires and confirmed the location. Tr. Bosserman.

16. Movement of the barge along the vessel created tension in the anchor wires. The anchor wires were visible when under tension. Tr. Bosserman. Smith-Rice's policy was to slacken the anchor wires to the bottom when vessels entered or departed berth 2 because the anchor wires under tension created a potential hazard to navigation. Id. at 55:16-24. Smith-Rice assured SSP it would slacken the wires when vessels entered or departed berth 2. Bosserman Dep. at 35-36.

17. The anchor wires were not marked with a buoy because the crown wire coming up from the anchor to the buoy created a navigation hazard to vessels coming in and out of the berth without marking the exact location of the anchor. Id. at 55:12-14, 128:11-19. No rule requires SSP or Smith-Rice to mark the anchors.

18. After the barge was secure, the ship to be loaded at berth 2 was moored so that the ship's port side would be adjacent to BARGE 5's port side. BARGE 5 moved forward and backward between the ship and the quay wall to load the various holds of the ship. Joint Stmt. at 3.

19. The M/V PACEMPEROR, a bulk carrier 607 feet long, was the first ship loaded in this manner. See Pl. Ex. 5, an aerial photograph of the PACEMPEROR. From late 1987 through early 1988, three more ships were loaded without incident using the same loading process and mooring arrangement. Joint Stmt. at 3.

20. Petty was present and placed the anchor wires for these first four vessels, but did not personally place

the anchors prior to the arrival of the PACGLORY. Tr. Vol. 1-71:3-8.

21. At 1712 hours, April 29, 1988, the PACGLORY arrived at the SSP facility and moored to berth 6, the berth west of berth 2. Loading commenced that evening and continued through early afternoon on April 30. The records show that the vessel was partially laden with steel shred and drew sixteen feet four inches at the bow and nineteen feet seven inches at the stern. Joint Stmt. at 3.

22. On the morning of April 30, 1988, BARGE 5 was moved into position and secured at berth 2 in preparation for PACGLORY'S arrival. PACGLORY would remain at berth 2 for further loading. At 1630 hours, April 30, 1988, the PACGLORY was shifted from berth 6 to berth 2, under the guidance of Pilot Capt. Joseph Devine. Id.

23. Pilot Capt. William Greig, a pilot trainee, was aboard the PACGLORY on April 30, 1988 during the shift to berth 2. Capt. Greig observed ten to fifteen feet of exposed wire extending from the port bow into the water. The wire was under some tension contrary to the Smith-Rice practice to slacken the wires. Greig Dep. at 56:16-17, 57:7-9.

24. Although Capt. Kim, the master of the PACGLORY at the time of the accident, states he does not remember seeing BARGE 5 when the PACGLORY entered berth 6, prior to leaving berth 6 he knew BARGE 5 would be used to load the vessel. He knew the barge would move back and forth along side the dock to load the vessel before leaving berth 6. Kim Dep. at 51:13-16; 53:1-25.

25. Capt. Peter Richards, the Lasco port captain showed Capt. Kim Pl. Ex. 2, the Seymour drawing of the mooring plan for berth 2. SSP did not mark the location of the anchor wires on this copy of the drawing. Capt. Kim asserts he did not know about the bow anchor wires prior to April 30, 1988. Id. at 54:11-20.

26. Capt. Kim did not inquire about the mooring arrangement of BARGE 5 between April 30 and May 4, 1988, while the PACGLORY was loading at berth 2. He observed the barge move back and forth along side of the PACGLORY fifty to one hundred times during that period. Id. at 65:20-24; Tr. Vol. 1-174:10, 174:16.

27. Smith-Rice did not communicate with the PACGLORY about the location of the anchor wires. It relied on SSP to communicate that information. Tr. Vol. 1-176:11-18; 178:21-24.

28. Floating derrick crane number 53, operated by Great Lakes Dredge and Dock Company, was positioned forty feet west of the former SSP pier 2, to the starboard side of the PACGLORY at 9:30 a.m. on May 4, 1988. The crane was idle at the time of the shift but was manned and engaged in demolition of SSP pier two. Pl. Ex. 20.

29. As a result of the presence of this barge, a vessel attempting to enter or exit berth 2 could not safely maneuver around a port bow anchor placed in the location identified by Smith-Rice.

30. On May 4, 1988 the PACGLORY was to be shifted from SSP berth 2 to SSP berth 6 to complete loading. Acting as agent for Lasco, Barry Bosserman called two tugs. Tr. Bosserman.

31. SSP did not inform the dispatcher, the tug pilots, or S. Joo Kim, Captain of the PACGLORY, of the location of the anchor wires, or that anchor wires were in use, although a radio was available to call the bridge of the ship. Moreover, SSP did not instruct Smith-Rice to communicate with the PACGLORY about the location of the anchor wires. Id. SSP should have warned the dispatcher, the pilot and the master about unmarked hazards such as the anchor wires.

32. SSP informed tug pilot, Capt. Hume about the anchor wires and relied on Capt. Hume to communicate this information to the pilots operating in the area. Id. This system was ineffective and unreliable because there are a large number of independent pilots and it is not likely that they would receive this information. In May 1988, a total of sixty-two pilots could have been called by SSP. SSP should have notified the dispatcher about the anchor wires. Tr: Figare.

33. Two tugs, the HONDO and the BOBBIE JO arrived at berth 2 and began to assist the PACGLORY at 10:05 a.m., May 4, 1988. Pl. Ex. 26.

34. Pilot Capt. Nicholas Ernser boarded the PACGLORY at 9:50 a.m. on May 4, 1988 to pilot the vessel during the transfer to berth six. Id. Capt. Ernser was employed by the master of the PACGLORY.

35. Between 9:50 a.m. and 9:56 a.m. Capt. Ernser checked the lines and the draft of the PACGLORY and checked the tide. He did not ask about any soundings that may have been taken, but concluded the keel of the vessel had one half inch clearance. Tr. Ernser.

36. With the tug BOBBIE JO on the starboard midship and the tug HONDO on the starboard, Capt. Ernser ordered the PACGLORY engines dead slow astern at 10:11 a.m. At that time BARGE 5 began to move along with the vessel and the soft lines of BARGE 5 began to strain. Capt. Ernser experienced no difficulty moving the PACGLORY astern. Capt. Ernser was standing on the port wing of the bridge while giving his commands. Pl. Ex. 21; Tr. Ernser.

37. Capt. Ernser ordered the engines to stop at 10:12 and attempted to move the vessel away from the quay once again with "slow bells" at 10:13 a.m. Again the barge moved with the vessel. Id. By this time, the port bow anchor wire had fouled the propeller of the PACGLORY.

38. Capt. Ernser could not see the anchor wires and relied on the account of an unidentified person on the barge who confirmed that anchor wires were out and confirmed the location of the anchor wires. Pl. Ex. 9; Tr. Ernser.

39. Capt. Ernser was aboard the PACGLORY for six minutes before attempting to move the vessel. He observed wires extending straight up and down from the bow and stern of the barge and assumed the anchors were directly under the barge. He did not attempt to determine the specific location of the anchors. He received no notice about the anchor wires from SSP or the master of the PACGLORY. Tr. Ernser.

40. The custom and practice in the shipping industry requires the party hiring a pilot and the agent of the wharfinger to notify the tug pilot, the ship pilot, and/or

the dispatcher of any unusual circumstances in a particular berth. Id.; Tr. Figare. SSP and Trans Pacific did not conform to this practice.

41. The tug HONDO did not experience any difficulty pulling the PACGLORY away from the dock. The maneuver did not require additional power. No unusual mud was evident from the wheel wash when the PACGLORY engine engaged. Tr. Cloes.

42. The tugs HONDO and BOBBIE JO were able to move the PACGLORY only fifty feet away from the dock before moving out into the estuary because the Great Lakes crane barge was positioned on the starboard side of the PACGLORY. Tr. Cloes.

43. Although no conditions prevented shifting the PACGLORY by tug power alone, using the ship's engine with a tug assist was consistent with common practice. Tr. Cloes.

44. According to soundings taken by SSP and an independent expert, the PACGLORY was afloat or barely touching the mud at 10:11 a.m. on May 4, 1988 when the stern engine engaged. Pl. Ex. 19. The water depth at the stern of the vessel was between 31.0 feet and 31.6 feet. The PACGLORY needed 31.08 feet elevation for the keel to clear the bottom on May 4, 1988. Pl. Ex. 23.

45. The distance between the lowest point of the propeller and the bottom of the keel was 1.69 feet (20.28 inches). Pl. Ex. 58; Tr. Tillett. The propeller requires 29.4 feet to clear the bottom. If the water depth at the propeller was 31.0 feet, the propeller cleared the bottom by 1.69 feet (19 inches). It is unlikely that a wire lying flat on

the bottom would have fouled the propeller of the PACGLORY even if the keel was actually touching the bottom. Tr. Tronoff.

46. When the port bow anchor wire of BARGE 5 was under tension it was an obstruction to navigation. Tr. Figare.

47. The port bow anchor wire of BARGE 5 was placed in the path of the PACGLORY. The PACGLORY could not safely maneuver around the wire. The wire was an obstruction to navigation.

48. The port bow anchor wire fouled the propeller of the PACGLORY sometime after the PACGLORY arrived at SSP berth 2.

49. The port bow anchor wire of BARGE 5 was severed between the propeller of the PACGLORY and the port bow anchor of BARGE 5. Tr. Vol. 1-94:19-21.

50. The portion of the port bow anchor that fouled the propeller of the PACGLORY was not lying flat on the seabed when it fouled the propeller.

51. The damage to the PACGLORY is causally related to the fouling of it's [sic] propeller by the port bow anchor wire of BARGE 5. This damage is a result of the placement of the wire.

52. The parties do not dispute that the amount of damages sustained by Trans Pacific total $178,057.58.

CONCLUSIONS OF LAW

1. This court has jurisdiction and venue over this action pursuant to the admiralty and maritime laws of the

United States. 28 U.S.C. § 1333; Fed. R. Civ. P. 9(h); 29 U.S.C. § 1391(b).

2. Where a vessel at the time of a collision is in violation of a statutory rule, well-established admiralty law provides that a presumption of fault arises and the burden is upon the violator to show "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been". The Steamship Pennsylvania v. Troop, 86 U.S. (19 Wall.) 125, 136 (1873).

3. The Pennsylvania Rule applies even though comparative fault is now applied in maritime collision cases. See Trinidad Corp. v. S.S. Keiyoh Maru, 845 F.2d 818, 822-25 & n.1 (9th Cir. 1988) (applying the Pennsylvania Rule and the comparative negligence standard adopted in United States v. Reliable Transfer Co., Inc., 421 U.S. 397 (1975)).

4. Under the Pennsylvania Rule this Circuit has held that once a violation is established the burden of overcoming the Rule's presumption is by clear and convincing evidence. Id. at 825.

5. Section 409 of the Rivers and Harbors Act, 33 U.S.C. § 409, provides in pertinent part that:

It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft. . . .

6. The waterway involved here is a "navigable channel" within the meaning of section 409. United States v. Osage Co., Inc., 414 F. Supp. 1097, 1102 (W.D.Pa. 1976); United States v. Cavalliotis, 105 F. Supp. 742, 743

(E.D.N.Y. 1952); National Forwarding Co. v. Payne, 297 F. 663, 664-66 (S.D.N.Y. 1923).

7. Since the purpose of section 409 is to prevent collisions, Allied Chemical Corp. v. Hess Tankship Co. of Delaware, 661 F.2d 1044, 1060 (5th Cir. 1981), it is a statutory regulation within the meaning of the Pennsylvania Rule. See Orange Beach Water, Sewer and Fire Protection Auth. v. M/V Alva, 680 F.2d 1374, 1380-81 (11th Cir. 1982).

8. Smith-Rice's placement of the port bow anchor wire constituted an obstruction within the meaning of section 409 and, therefore, was a violation of section 409.

9. Liability for violation of section 409 is not limited to the barge operator, Smith-Rice. Where the wharfinger has approved the anchoring arrangement that causes an obstruction in violation of section 409 it is also liable for the violation.

10. SSP hired Smith-Rice to establish a loading system, approved the anchoring arrangement for the system, was fully aware of the use of unmarked anchor wires, regularly observed the loading operation and had a duty to prevent obstruction of the navigable channel. Therefore, SSP is also liable for a violation of section 409, and the court finds that the presumption of the Pennsylvania Rule operates with equal force to both Smith-Rice and SSP.

11. Furthermore, wharfingers have a "duty to exercise reasonable diligence to furnish a safe berth and to avoid damage to the vessel. This includes the duty to ascertain the condition of the berth, to make it safe or

warn the ship of any hidden hazard or deficiency known to the wharfinger or which in the exercise of reasonable care and inspection, should be known to him and not reasonably known to the ship owner." Orduna S.A. v. Zen-Noh Grain Corp., 913 F.2d 1149, 1152 (5th Cir. 1990) (quoting Trade Banner Line, Inc. v. Caribbean S.S. Co., S.A., 521 F.2d 229, 230 (5th Cir. 1975), cert. denied, 435 U.S. 924 (1978)).

12. SSP is a wharfinger. It leased the pier, had control over the pier and operations at it, contracted for berthing of the PACGLORY, oversaw the berthing and loading of vessels at the pier and regularly observed the loading operations. See, e.g., United States v. City of Redwood City, 640 F.2d 963, 967-68 (9th Cir. 1981) (party which owned piers, provided berth, patrolled them and checked for problems in berth area treated as wharfinger); Bangor & Aroostook R.R. Co. v. The Ship Fernview, 455 F. Supp. 1043, 1062 & n.52 (D.Me.1978) (applying definition pursuant to Maine statute); Black's Law Dictionary 1595 (6th ed. 1990) (defining a wharfinger as the "owner or occupier of a wharf; one who for hire receives merchandise on his wharf, either for the purpose of forwarding or for delivery to the consignee on such wharf").

13. SSP breached its duties as a wharfinger by creating and allowing the existence of a hazard that obstructed safe berthing and by failing to warn the vessel of the hazard.

14. Another presumption in the assignment of fault is implicated here. Where a moving vessel strikes a stationary object there is a presumption that the moving

vessel is at fault. Wardell v. DOT, Nat. Transp. Safety Bd., 884 F.2d 510, 512 (9th Cir. 1989). The presumption operates to make a prima facie case against the vessel and shifts the burden of persuasion to the vessel. To overcome the presumption the vessel must show that it "did all that reasonable care required." Boudoin v. J. Lay McDermot & Co., 281 F.2d 81, 88 (5th Cir. 1968) (quoting L. Hand, J. in The Hylas, 1925 A.M.C. 921, 925 (S.D.N.Y. 1913)).

15. However, the presumption is defeated where the shipowner, his employees or agents have no knowledge of the stationary object. Delta Transload, Inc. v. M/V Navios Commander, 818 F.2d 445, 450 (5th Cir. 1987). The port bow anchor wire is a stationary object within the meaning of Delta Transload.

16. Ordinarily the "shipowner . . . bears the responsibility for the acts of the pilot." Guangco v. Edward Shipping & Mercantile, S.A., 705 F.2d 360, 362 (9th Cir. 1983). The antecedents to this rule are long and venerable. See Sherlock v. Alling, 93 U.S. 99, 106-08 (1876); The Merrimac, 81 U.S. 199, 203 (1871); The China, 74 U.S. 53, 64 (1868). In 1901 the Supreme Court distinguished this long line of cases and found that the rule did not apply where state law compelled the owner to accept the pilot. Homer Ramsdell Co. v. Comp. Gen. Trans., 182 U.S. 406, 416-17 (1901).

17. The general rule imputing liability of the pilot to the shipowner applies in this case, and the parties do not argue to the contrary. Thus, the exception in H. Ramsdell Transportation does not excuse Trans Pacific. For the reasons set forth in paragraph 18 below the court finds that the presumption articulated in Wardell applies.

18. In this case, the operators of the vessel had knowledge of the existence of the anchor wire, although they did not know its exact location at the time of the accident. The fact that the wire was not immediately visible does not relieve Trans Pacific of the presumption. Trans Pacific was aware of the loading system. The master of the vessel failed to inquire about the location of the port bow anchor wire before moving the vessel. Pilot Greig, for whose conduct Trans Pacific is responsible based upon the authorities in paragraph 16 above, had seen the exposed wire. Thus, Trans Pacific was on notice of the anchor wire and failed to further inquire about or confirm its location.

19. The doctrine of res ipsa loquitor [sic] does not apply to the facts of this case. Res ipsa permits the drawing of inferences from unexplained events. In the context of admiralty law, the doctrine is another species of the rule articulated in Wardell. See Brown Root Marine Operators, Inc. v. Zapata Off-Shore Co., 377 F.2d 724, 726 (5th Cir. 1967). In order for the doctrine to apply three criteria must be met: 1) the injured party must be without fault; 2) the cause of the injury must be under the exclusive control of the defendant; and 3) the accident would not ordinarily occur unless there was negligence. Johnson v. United States, 333 U.S. 46, 49-50 (1948); United States v. Nassau Marine Corp., 778 F.2d 1111, 1115 (5th Cir. 1985). Furthermore, in this Circuit proof of the doctrine does not create a presumption, but merely serves as a "form of circumstantial evidence that permits an inference to be drawn from a set of proven facts." Reber v. United States, 941 F.2d 975, 978 & n.1 (9th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 1675, (1992).

20. The facts of this case do not present a neat fit with the strict doctrine of res ipsa loquitur. As noted above, the court finds that Trans Pacific is not free of negligence. Furthermore, the cause of the accident, the anchor wire, was under the joint control of SSP and Smith-Rice, each of whom the court finds negligent. Finally, the cause of negligence in this case is not inexplicable. For example, the theory that the vessel was low in the water thus allowing its propeller to catch the anchor wire lying along the bottom is well within the realm of possibility, even though the court ultimately rejected that theory in the findings above. Therefore, the court concludes that res ipsa loquitur does not apply to the facts in this case.

21. Principles of comparative fault apply, United States v. Reliable Transfer Co., 421 U.S. 397, 411 (1975), and damages are to be apportioned according to the parties' comparative degrees of fault. Newby v. F/V Kristen Gail, 937 F.2d 1439, 1442 (9th Cir. 1991).

22. Based upon the foregoing the court finds that the percentage of fault attributable to each party is as follows:

Trans Pacific – 20%
Smith-Rice – 35%
SSP – 45%

23. Plaintiff is entitled to prejudgment interest from the date of loss. King Fisher Marine Service, Inc. v. N.P. Sunbonnet, 724 F.2d 1181, 1187 (5th Cir. 1984), reh'g denied, 729 F.2d 315 (5th Cir. 1984).

24. The rate of prejudgment interest is determined by the fifty-two week U.S. Treasury bill rate as of the date of the loss, which in this case is 7.01%. See Western Pacific Fisheries, Inc. v. S.S. President Grant, 730 F.2d 1280, 1289 (9th Cir. 1984).

25. Accordingly, defendant Smith-Rice is liable to plaintiff Trans Pacific in the amount of $62,320.15 plus prejudgment interest at the rate of 7.01%, or $22,299.83, for a total of $84,619.98 and defendant SSP is liable to plaintiff Trans Pacific in the amount of $80,125.91 plus prejudgment interest at the rate of 7.01%, or $28,671.20, for a total of $108,797.11.

IT IS SO ORDERED.

DATED: OCT 14 1992

MARILYN HALL PATEL

United States District Judge